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No. 82-303

In the Supreme Court of the United States

OCTOBER TERM, 1982

CIRO CALLICO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Sixth Amendment right to confront adverse witnesses was abridged in the circumstances of this case by the district court's refusal to permit him to cross-examine a government witness concerning immunity the witness was granted by the United States in connection with its investigation of an unrelated crime and a state grant of immunity.

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OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. A; 679 F.2d 249 (table)).

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1982, and a rehearing petition was denied on June 25, 1982. A petition for a writ of certiorari was filed on August 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of conspiracy (count 1), one count of embezzlement and misapplication of bank funds (count 2), eleven counts of making false statements to an FDIC-insured bank (counts 3-13), and one count of causing a false

entry to be made in a report or statement of the Hibernia Bank with the intent to injure and deceive the bank and to deceive the examiners of the Comptroller of the Currency and the FDIC (count 14), in violation of 18 U.S.C. 2, 371, 656, 1005, and 1014. He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A).

The evidence, the sufficiency of which petitioner did not challenge in the court of appeals and does not challenge here, showed that petitioner owned several businesses in the New Orleans, Louisiana, area and that he was a customer of the Hibernia National Bank. Over a period of time, petitioner arranged with Victor Lota, a vice-president of the bank, to obtain 33 loans, either for his own or Lota's benefit. In each instance, someone other than petitioner was listed as the applicant because petitioner had reached the maximum that bank policy permitted one customer to borrow without approval by a committee of bank officials. In addition, petitioner secured through Lota four additional loans in petitioner's own name, the amounts of which exceeded the limit that Lota was authorized to approve. One of these loans, in the amount of $275,000, was falsely reported as being for "business" purposes when in fact the proceeds were used by Lota to pay off a bank loan that Lota had obtained in order to finance a marijuana smuggling transaction. The aggregate amount of the unauthorized loans obtained by petitioner was $1,776,700 (IV Tr. 92-94, 98-99, 102, 105-110, 124-130, 142-144, 146; R. 27-40).[1]

Lota pleaded guilty to related charges and testified for the government at petitioner's trial. During both direct and cross-examination, Lota was questioned extensively concerning his plea agreement with the federal government in

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[1] "R." refers to the record in the court of appeals.

this case as well as other matters relating to his credibility (see pages 4-5, *infra*). However, the district court granted the government's motion prohibiting defense counsel from inquiring about a state grant of immunity in connection with Lota's participation in the Hibernia National Bank transactions or about a federal grant of immunity conferred when Lota testified before a grand jury in the Western District of Texas investigating the murder of a federal judge in that jurisdiction.

ARGUMENT

Petitioner's sole contention (Pet. 9-19) is that the district court violated his Sixth Amendment right to confront adverse witnesses when it refused to permit him to cross-examine Lota concerning the state grant of immunity and the federal grant of immunity in connection with the murder of Judge Wood in Texas. The court of appeals correctly rejected this claim.[2]

While decisions regarding the scope of cross-examination generally are committed to the trial court's discretion, if petitioner's counsel's cross-examination of Lota had been so restricted that he was unable to develop adequately the issue of bias, a violation of petitioner's constitutional right to confront witnesses might well have resulted. See *Davis* v. *Alaska*, 415 U.S. 308, 316-318 (1974).[3] Here, however,

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[2]Although the court of appeals did not issue a written opinion in petitoner's case, less than two months earlier it had specifically rejected the contention that the refusal to permit cross-examination of Lota concerning the immunity he received from the federal government in connection with its investigation of the murder of Judge Wood invalidated the conviction of another defendant on charges similar to those on which petitioner was convicted. *United States* v. *Milstead*, 671 F.2d 950, 952-953 (5th Cir. 1982).

[3]Petitioner has not alleged any conflict among the circuits on the issue he presents, and we are aware of none. Indeed, the cases on which petitioner relies (Pet. 11-13) make clear that the Fifth Circuit is highly

lengthy cross-examination on matters pertaining to bias was permitted. The restriction on cross-examination was imposed only as to two subjects that had little, if any, relevance, were cumulative, and had substantial potential for confusing the jury. The propriety of the court of appeals' determination thus presents no issue warranting further review.

On direct examination, Lota discussed the terms of and the circumstances surrounding his plea agreement with the federal government in this case. He explained that he initially was permitted to plead guilty to 10 counts of conspiracy and misapplication of bank funds in exchange for his agreement "to testify truthfully and completely to Federal agents and also before the Grand Jury and as a witness in any trial" (IV Tr. 85). He admitted, however, that he had been untruthful in interviews with the FBI and that he had perjured himself before the grand jury, as a result of which the government had cancelled the plea bargain. Thereafter, Lota testified, he returned to the grand jury, recanted the untruthful portion of his prior testimony, and entered into a second plea agreement with the government whereby he pled guilty to 15 counts of a 21-count indictment (*id.* at 85-90).[4]

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sensitive to the risk of bias on the part of a government witness arising from a grant of immunity or other agreement with the authorities. See *United States* v. *Crumley*, 565 F. 2d 945, 949-950 (5th Cir. 1978); *United States* v. *Mayer*, 556 F. 2d 245, 248-249 (5th Cir. 1977); *United States* v. *Onori*, 535 F. 2d 938, 945 (5th Cir. 1976).

[4]In her opening argument, the prosecutor also alluded to the plea agreement (I Tr. 28):

> [Lota] has already been convicted of fourteen felony counts and is serving time. Mr. Lota has done a lot of very, very serious things in this case and in other cases involved with other people. He was doing the same sort of thing with other people, also. He originally agreed to cooperate with the Government and plead guilty to multiple felony counts and he appeared before the Grand Jury

Lota was cross-examined vigorously and at length concerning matters relating to his credibility, including his involvement in the transactions for which petitioner was convicted as well as his involvement in several similar schemes with other individuals (IV Tr. 148-149, 163-164). Defense counsel also questioned Lota about his false grand jury testimony and the fact that he provided truthful information only after he was found to have failed a polygraph test (*id.* at 149-157, 177-178, 185). Further cross-examination revealed that Lota on several occasions had used his position at the bank in order to obtain sexual favors from women and that he was involved in two marijuana importation schemes (*id.* at 155, 165-168). Petitioner's counsel made good use of this evidence in attacking Lota's credibility during both his opening and closing statements (I Tr. 37-38, 41-42; VI Tr. 50-51).

In view of this far-reaching, multi-pronged attack on Lota's credibility that was permitted by the district court, evidence of the immunity that was granted to Lota by the federal authorities in connection with their totally separate investigation of the murder of a federal judge or the state grant of immunity would have been largely cumulative.[5] Moreover, the district court reasonably concluded that any probative value that such evidence may have had would have been far outweighed by its prejudicial effect. Few crimes would be more likely to inflame a jury's passions than the murder of a federal judge, and any effort to place

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and he lied. The plea bargain was broken and he was indicted and subsequently plead [*sic*] guilty. He has appeared before the Grand Jury again and has talked to the Grand Jury about why he lied and what the actual facts of the case are. We are going to present him to you for you to look at, for you to decide for yourself whether or not you believe Mr. Lota, in which respect.

[5]In its original plea agreement with Lota, the federal government represented that it would bring Lota's cooperation to the attention of the Attorney General of Louisiana and the District Attorney's Office

Lota's involvement in that incident into its proper perspective would have required a "mini-trial" on a wholly collateral point. Similarly, inquiry into negotiations between the witness and another sovereign could well have created confusion in the minds of the jurors. See Fed. R. Evid. 403. In these circumstances, the court's limitation on cross-examination was not a constitutional infringement; rather, it was a sound exercise of discretion in determining the proper scope of cross-examination. See *United States* v. *Renfro*, 620 F.2d 497, 500-501 (5th Cir.), cert. denied, 449

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for Orleans Parish, in which the alleged embezzlement of the Hibernia Bank had occurred, if those authorities indicated an inclination to prosecute Lota on state embezzlement charges. That agreement expressly acknowledged, however, that the United States Attorney had no authority to bind the state prosecutors; moreover, no such representation was contained in the final agreement between Lota and the federal authorities. See letters of Apr. 24, 1980, and September 5, 1980, to the United States District Court for the Eastern District of Louisiana signed by Lota, Lota's attorney, and government counsel. In any event, the state grant of immunity on which petitioner bases his claim here was extended by Tangipahoa Parish for Lota's involvement in the two marijuana importation transactions that occurred there (see Pet. 7-8, 17), not by the Orleans Parish in connection with the embezzlement charges to which the federal agreements referred.

In its final plea bargain with Lota, the federal government agreed to bring to the attention of the sentencing court "the full facts and circumstances involving cooperation rendered to any law enforcement authorities by [Lota]." Sept. 5, 1980 letter, *supra*. Accordingly, in an October 14, 1980 letter to Judge Beer, the United States Attorney advised that Lota had testified truthfully before a grand jury in the Western District of Texas. We are not aware of any other connection between Lota's testimony against petitioner in this case and the grants of immunity concerning which cross-examination was not permitted. In our view, the district court correctly concluded that any marginal relevance those grants of immunity may have had to petitioner's case was far outweighed by the prejudice and confusion that their admission would have engendered. (The letters referred to above are part of the public record in *United States* v. *Victor J. Lota*, Criminal Docket No. 80-332-M (E.D. La.).)

U.S. 921 (1980); cf. *District of Columbia* v. *Clawans*, 300 U.S. 617, 632 (1937); *Alford* v. *United States*, 282 U.S. 687, 694 (1931).

Moreover, contrary to petitioner's suggestion (Pet. 6-7), this case did not present a one-on-one "swearing contest" between him and Lota.[6] For example, in addition to extensive documentary evidence, the government presented several witnesses who expressly contradicted petitioner's testimony that he had their consent to use their names to obtain loans from the Hibernia Bank and to use the proceeds of those loans for his own purposes. Compare Pet. 6; V Tr. 64-71, 96-98, 99-102, 131-140 with II Tr. 187-192, 205-208; III Tr. 100-114, 131-140. Particularly because the government's case did not turn on the jury's assessment of Lota's credibility, the district court neither abused its discretion nor abridged petitioner's Sixth Amendment right to confront witnesses when it prohibited further inquiry into the witness's immunized status.

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[6]In both opening and closing statements the prosecutors advised the jury that the government was not "basing [its] case" on Lota's testimony. I Tr. 28; VI Tr. 25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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